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IN THE

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

DEAN MARTINEZ, Secretary of the Illinois Department of Financial and Professional Regulation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of *Younger* abstention has not been consistently applied by the circuit courts of appeals with some circuits discounting the federal interest and focusing instead upon the state interest in determining whether abstention is required. This failure to conduct a reasoned threshold analysis will result in abstention becoming the rule, rather than the exception, in cases involving administrative proceedings. Further, there is considerable disagreement among the circuits as to how to synthesize the principles of res judicata and collateral estoppel with *Younger* abstention in a case involving administrative proceedings; specifically, whether a party is obligated to pursue state court review of an administrative action to avoid res judicata or collateral estoppel on the legal issues that could have been addressed by a reviewing court but not the underlying administrative forum.

The questions presented for review are as follows:

1. Whether abstention in favor of a state administrative proceeding is required in cases involving important federal interests such as the commerce clause, where the underlying principle of comity is necessarily diminished thereby justifying "a narrower view of state interests in the abstention context". *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348, 357 (4th Cir. 2005).

2. Whether *Younger* abstention should be expanded to require a federal court to abstain where an administrative proceeding is filed after institution of the federal case and the federal plaintiff cannot obtain review of the

constitutional issues until subsequent court review which is restricted to the limited record before the agency.

3. Whether *Younger* abstention requires a party to pursue a state court appeal of an administrative agency decision to avoid the application of res judicata on legal issues when the agency cannot consider the constitutional question presented by that party.

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STATUTES

42 U.S.C. § 1983 2

IN THE

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

There is a split among the circuits as to whether to apply *Younger* abstention in cases involving issues of national importance such as the commerce clause. The Third and Fourth Circuits hold that where the issue in the federal case is a peculiarly national interest, *Younger* abstention is improper. In contrast, the First, Sixth, Seventh and Eighth Circuits require abstention regardless of the nature of the underlying federal claim.

Petitioner's second and third questions, whether *Hicks v. Miranda,* 422 U.S. 332 (1975), applies to bar

federal litigation based on a post-filed administrative claim and whether a litigant must pursue state court review of agency proceedings prior to assertion of a claim under 42 U.S.C. § 1983, likewise merit review. Neither question has been addressed by this Court and the availability of a federal forum to address federal constitutional claims is of paramount importance.

Contrary to Respondent's claim, both questions were raised in the courts below. *Compare* Br. at 1, 9-10, 24 *with* Stroman's September 25, 2006 Seventh Circuit Appellate Br. at 37-38, 41-43. Even had they not been, review by the Court is appropriate. *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (citation omitted); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001).

I. The Conflict Among the Circuits on the Application of *Younger* Abstention to Federal Claims is Real and Should be Resolved by the Court.

There is confusion among the circuits as to whether *Younger* applies when the federal claim involves important national interests such as the commerce clause. Respondent, however, insists that the circuits are aligned, referring to conflicting decisions in other circuits and "more recent Fourth Circuit case law" which it claims demonstrate that certiorari is unwarranted. Br. 1, 15, 21. In fact, Respondent's authorities underscore, rather than eliminate, the

disparity among the circuits when important federal interests are at issue.

Thus, in contrast to the Third and Fourth Circuits, the court in *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990), and *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990), directly rejected the plaintiff's contention that *Younger* abstention is inappropriate when the "federal action involves commerce or supremacy clause challenges to a state statute". *McCartney*, 896 F.2d at 1142. Like the Seventh Circuit in this case, the Eighth found that the federal issues could be raised on judicial review and therefore *Younger* abstention applied. *McCartney*, 896 F.2d at 1142; *Pomeroy*, 898 F.2d at 1319. Neither case gave consideration to the nature of the underlying federal claims.

Respondent's claim that the Fourth Circuit is now in line with other circuits rests solely on *DirectTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008). *DirectTV*, however, did not involve *Younger* abstention and indicates no departure from *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348 (4th Cir. 2005), and *Life Partners, Inc. v. Morrison*, 484 F.3d 284 (4th Cir. 2007). In *DirectTV*, the court refused to honor plaintiffs' request for a "federal court-ordered redistribution of intra-state taxation authority." *DirecTV, Inc.*, 513 F.3d at 127.[1] Noting that

[1] In taxing authority cases, courts look to the relief sought to determine if the state taxing authority is implicated. *Hibbs v. Winn*, 542 U.S. 88, 99 (2004); *DirectTV*, 513 F.3d at 124. Interestingly, in *Hibbs*, the Court specifically considered the fact that the relief sought was "prospective relief only" in holding that the Tax Injunction Act did not bar the federal suit. *Hibbs*, 542 U.S. at 99. The prospective nature of the relief sought is

taxes are the basis by which states carry on their governments, the court reiterated:

> the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," requiring federal courts, *when the comity principle applies*, to deny relief in challenges to state tax laws "in every case where the asserted federal right may be preserved without it."

Id. at 123 (citation omitted) (emphasis added). All *DirectTV* stands for is that the court must analyze the underlying claim prior to abstaining.

Respondent also attempts to eliminate the split asserting that the Fourth Circuit only exerts jurisdiction where there is "a facial challenge to a state law that patently discriminate[s] against interstate commerce." Br. at 10. Whether the underlying commerce clause claim involves an attack based on facial invalidity versus a direct or indirect burden on interstate commerce is not dispositive.

Respondent's claim that *Life Partners* involved a facial challenge is simply wrong. Br. at 21-22. In *Life Partners*, the plaintiff challenged Virginia's assertion of authority over "all viatical settlements involving Virginia viators" on the grounds that it was so broad that it affected commerce occurring wholly outside Virginia. *Life Partners, Inc.*, 484 F.3d at 291. The plaintiff likewise argued that the requirement that anyone transacting with a Virginia viator be licensed by Virginia and the price controls established by Virginia also discriminated against com-

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also a factor in determining when *Younger* abstention is appropriate. *Wooley v. Maynard*, 430 U.S. 705, 711 (1977).

merce. *Id.* Similarly, in Petitioner's case, Stroman argued that Respondent's assertion of authority over non-residents and regulation of personal service contracts in Texas was "so broad that it affected commerce occurring wholly outside" Illinois, and Stroman likewise challenged Respondent's claim that Stroman requires an Illinois license. *Id.* And, as Respondent concedes, the reason the commerce clause claim failed in *Life Partners* was because of Congress' express delegation of authority to the states in matters involving insurance. *See* Br. at 22. In Stroman's case, there has been no such delegation.

Respondent's remaining cases do not diminish the conflict. In *Trans Shuttle, Inc. v. Pub. Utilities Comm'n*, 2001 WL 1355987 (10th Cir. Nov. 5, 2001), shuttle operators providing *intrastate* transportation in Colorado sought declaratory and injunctive relief challenging imposed fines based on the merits of their preemption claim while state court review of those penalties was pending. *Trans Shuttle, Inc.*, 2001 WL 1355987, at **5. The federal court did not address whether the nature of the federal claim should be viewed in conjunction with the asserted state interest, but focused on the fact that the preemption issue was being litigated in the state proceeding. The court did not mention any commerce clause claim in considering *Younger*, as Respondent suggests. *See* Br. at 19. Although Respondent highlights *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962 (6th Cir. 1991) as a case where the court deemed the federal preemption issue irrelevant to the abstention analysis (Br. at 19), the focus of that case, like *Trans Shuttle, Inc.*, was the state's interest in regulating *intrastate* trucking, a distinc-

tion observed in *Harper*, 396 F.3d at 356, and state court appellate review was already pending.[2]

As previously explained, the circuits also are divided as to the consideration that the federal courts should give to the nature of the federal claim in determining whether to exercise jurisdiction. Pet. at 22-23. Respondent belittles the Third Circuit's holding in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), because it refers to *Ford Motor Co. v. Ins. Comm'r of Com. of Pa.*, 874 F.2d 926 (3d Cir. 1989), which was decided prior to *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350 (1989) ("*NOPSI*"). Br. at 23. Both *Hi Tech Trans* and *Ford Motor Co.* are good law.

Ford merely recognized the policy underlying *Younger*, observing that "the principles of comity and federalism upon which the *Younger* doctrine is predicated, are not undermined" by determining whether the state enforcement conflicts with enforcement of federal law. *Ford*, 874 F.2d at 935. *Ford*'s observation that "the presence of a claim of preemption will not preclude abstention in every case", *id.* at 935 n.12, is consistent with *NOPSI*'s statement that "the *mere* assertion of a substantial constitutional challenge to state action will not *alone* compel the exercise of federal jurisdiction", and would, as indicated by its citation in *Hi Tech*, be decided similarly today. *NOPSI*, 491 U.S. at 364 (emphasis added).

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[2] Likewise, in *Woodfeathers, Inc. v. Washington County, Or.*, 180 F.3d 1017 (9th Cir. 1999), (Br. at 18), the federal plaintiff had participated in a state court trial which was on appellate review and brought its federal claim while the appeal was pending. Abstaining, the court noted that the litigant could and did raise its preemption claims in both the state trial and appellate court proceedings. *Woodfeathers, Inc.*, 180 F.3d at 1021.

Despite the conflict and the important questions thus far left unanswered by this Court, Respondent urges the Court to deny certiorari, asserting that this case is an "exceptionally poor vehicle for resolving" those issues. Br. at 33. In so doing, Respondent makes various related arguments that presenting Stroman's commerce clause claims in federal court requires the federal court to interpret Illinois law. *Id.* As in *Hibbs*, however, Stroman has not "asked the District Court to interpret any state law - there is no disagreement as to the meaning of [the Illinois statutes], only about whether, as applied, the State's law violates the Federal Constitution." *Hibbs*, 542 U.S. at 106 n.8.[3] *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944) (Br. at 33) is thus of no consequence here. *See Spector*, 323 U.S. at 104 (in challenge to business tax, state court needed to resolve ambiguous questions concerning the subject matter of the tax, calculation and portion of business to which it applied before reaching constitutional questions). Here, the federal litigation does not involve interpretation of the statutory scheme, but rather Respondent's ability to enforce those laws against Petitioner in light of the commerce clause.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), support Respondent's claim that abstention is required to give Illinois tribunals an opportunity to construe the act "in a way that obviates or narrows the constitutional question." Br. at 33-34. *Pennzoil* involved a federal suit to have state bond and confession of judgment procedures declared unconstitutional,

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[3] Respondent appears to be raising a *Burford* abstention argument. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* was not, however, the basis for decision in the underlying case and is inapplicable here.

thereby undermining the state court judgment. *Pennzoil* stressed, however, that the Court "does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court". *Pennzoil* turned on "the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'". *Pennzoil*, 481 U.S. at 14 n.12 (citation omitted). Further, while the commerce clause may have been raised as a ground for challenging the state enforcement proceedings, it apparently was not the focus of the federal claim. *Pennzoil*, 481 U.S at 6 n.6. *Fenner v. Boykin*, 271 U.S. 240 (1926) (Br. at 13) is likewise inapposite. That case involved an attempt to enjoin *criminal* court action against persons operating within the state and conducting allegedly illegal transactions.

Nor is abstention warranted on the off chance that the state court on judicial review of the after-filed administrative action may resolve the case on state law grounds without reaching the commerce clause issue, as Respondent maintains. Br. at 34. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984); *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.").

The presence of a theoretical state law remedy does not support abandoning otherwise proper federal jurisdiction. Indeed, in *Home Tele. & Tele. Co. v. Los Angeles*, 227 U.S. 278 (1913), this Court *rejected* the notion that the existence of state remedies barred federal jurisdiction, stating that this would "render impossible the performance of the duty with which

the Federal courts are charged under the Constitution" because "the power of the Federal court to afford protection to a claim of right under the Constitution . . . as against the action of a state or its officers, would depend on the ultimate determination of the state courts . . . ." *Home Tele. & Tele. Co.*, 227 U.S. at 284; *see also Schall v. Joyce*, 885 F.2d 101, 113 (3d Cir. 1989) (observing that "federal courts should assume jurisdiction over a case even though relegating the plaintiff to state law remedies would avoid the need to adjudicate a constitutional question.") (applying *Home Tele. & Tele. Co.*).

Respondent's claim that Petitioner's pending Fifth Circuit case could moot the issues in this case deserves no credence. Br. at 34. *Younger* abstention was not an issue in that case. Even if the court affirms the district court's commerce clause ruling in Petitioner's favor, that decision would not bind the Seventh Circuit, nor would it necessarily have "preclusive effect" on Respondent as it suggests. *Id.* In short, none of these hypothetical possibilities has any bearing on whether the Court should grant certiorari in this case.

II. This Court Should Address the Issue of Whether Administrative Actions Filed After a Federal Plaintiff has Filed Suit in Court Constitutes an "Ongoing State Judicial Proceeding" Compelling *Younger* Abstention.

While some circuits have applied *Hicks v. Miranda*, 422 U.S. 332 (1975) to administrative proceedings, others have not. Thus, in *CECOS Int'l, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the court refused to abstain pursuant to *Younger* where an administra-

tive proceeding was re-opened after a federal plaintiff had filed suit because there was no on-going proceeding pending at the time the federal claim was initiated. *CECOS*, 895 F.2d at 72. "A federal court need not stay its jurisdictional hand when there is no state action pending at the time the federal suit is filed, even if there is a substantial likelihood that a state proceeding will be instituted in the future to vindicate the state's interests." *Id.*, citing *Constantineau*, 400 U.S. at 439. The Court should decide whether *Hicks* has any application to administrative proceedings initiated after federal suit is filed.[4] *See* Pet. at 23-28.

Here, Petitioner brought suit after it received a letter demanding compliance with Illinois law and Stroman sued before any administrative proceeding was instituted. The Court should resolve the issue of whether a state agency can divest the court of jurisdiction under these circumstances or whether the rule set forth in *CECOS* controls.

III. This Court has Never Addressed Whether Plaintiffs are Required to Pursue State Court Review of Agency Decisions Either Before or to the Exclusion of a Federal Action Under 42 U.S.C. § 1983 Seeking Prospective Injunctive Relief.

Respondent argues that Stroman's third question is "hypothetical". Br. at 28. The availability of future

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[4] Respondent misapprehends Petitioner's point regarding plaintiff-defendant privity in *Hicks*. Br. at 25. In *Hicks*, the state court defendant was in privity with the federal court plaintiff and the state court defendant had been sued *prior* to the institution of the federal civil rights action. *Hicks*, 422 U.S. at 348. No such privity exists here.

judicial review, however, was the linchpin of the Seventh Circuit's decision when it refused jurisdiction. If, however, as other circuits have held, the availability of a state court appeal from an administrative action does not require *Younger* abstention, then it necessarily follows that the fact that one could raise a constitutional defense eventually on appeal should not result in abstention from the exercise of a federal court's jurisdiction.

Here, the administrative action in this case was instituted only after Stroman sued Respondent in federal court. Petitioner's case is thus unlike *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), where the administrative actions were ongoing at the time the plaintiffs filed their federal suits and those suits were brought with the intent to derail the agency actions.[5] Yet, the Seventh Circuit's ruling imposes an exhaustion requirement where none exists. Thus, the Seventh Circuit's ruling is at odds with the Fifth Circuit's in *Thomas v. Texas State Bd. of Med. Exam'rs*, 807 F.2d 453 (5th Cir. 1987). There, the court held "[t]he mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Huffman*." *Thomas*, 807 F.2d at 456. *See also*, *Norfolk & W. Ry. Co. v. Pub. Utilities Comm'n of Ohio*, 926 F.2d 567, 572 (6th Cir. 1991) (rejecting claim that state action was pending where federal plaintiff did not exhaust its right of appeal of administrative order and declining

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[5] Indeed, the state action in *Middlesex* permitted the state defendant to raise his constitutional claims in that action. *Middlesex*, 457 U.S. at 430-31.

to abstain); *CECOS*, *supra*. *Cf.*, *Pomeroy* and *McCartney*, *supra*. Where a litigant seeks prospective relief and the administrative action cannot provide it, abstention should not be required nor the litigant obligated to wait for the conclusion of an administrative action that cannot resolve the federal question.

CONCLUSION

This case presents the Court the opportunity to resolve the disparate treatment of *Younger* by the courts of appeals. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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